SUPREME COURT, U.S.
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NO. 931802

IN THE

Supreme Court of the United States

October Term, 1993

BETTY GUPTON,

Petitioner

v.

COMMONWEALTH OF VIRGINIA, et al.

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the Court of Appeals overlook material facts which established that the plaintiff was "handicapped" as defined in 29 U.S.C. § 794?

2. Did the Court of Appeals err in its interpretation of the definition of "handicapped" as defined in 29 U.S.C. § 794?

3. Did the Court of Appeals err in affirming the decision of the Court of Appeals granting the respondent summary judgment on petitioner's claim under Section 1983 of the Civil Rights Act of 1964?

PARTIES TO THIS PROCEEDING

BETTY F. GUPTON

COMMONWEALTH OF VIRGINIA

RAY D. PETHEL

WILLIAM BRYANT

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THIS PROCEEDING. ii

TABLE OF AUTHORITIES. iv

OPINIONS BELOW. 1

JURISDICTION. 2

STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF CASE. 3

I. FACTS AND NATURE OF THE CASE . 3

II. THE PROCEEDINGS BELOW 10

REASONS FOR GRANTING THE WRIT. 11

CONCLUSION. 41

APPENDIX 43

TABLE OF AUTHORITIES

Cases Page(s)

Carter v. Tisch, 822 F.2d 465 (4th Cir. 1987) 32,35

Daley v. Koch, 892 F.2d 212 (2nd Cir. 1989) 34

E.E. Black, Ltd. v. Marshall, 497 F.Supp. 1088 (D.Hawaii 1980) 20

Forrisi v. Bowen, 794 F.2d 931 (4th Cir. 1986) . . . . . passim

Gupton v. Virginia, 14 F.3d 203 (4th Cir. 1994) . . . . . passim

Harris v. Adams, 873 F.2d 929 (6th Cir. 1989) 31

Jackson v. State of California, 740 F. 2d 1534 (9th Cir. 1991) 32

Magel v. Federal Reserve Bank of Philadephia, 776 F.Supp. 200 (E.D.Pa. 1991) 31

Maulding v. Sullivan, 961 F.2d 694 (8th Cir. 1992) 33

Miller v. AT&T Network Systems, 915 F. 2d 1404 (9th Cir. 1990) 33

School Board of Nassau County v. Arline, 480 U.S. 273 (1987) 36,37,40

Youngberg v. Romeo, 457 U.S. 307 (1982) 39,41

Mitchell v. Schweiker, 699 F.2d 185 (4th Cir. 1983) 29

Vickers v. Veterans Administration, 549 F.Supp. 85 (W.D. Wash. 1982 28,29,40

Statutory and Constitutional Provisions

28 U.S.C. § 1254(1). 2

29 U.S.C. § 794 (§ 504 of the Rehabilitation Act). 2

29 U.S.C. § 796(8)(A) (§ 505) . 20

42 U.S.C. § 423(d)(2)(A) . . . 18

42 U.S.C. § 1382c(a)(3)(B) . . 18

42 U.S.C. § 1983. 2,37

Administrative Regulations and Rulings

45 C.F.R. Part 84 App. A. 346 (1989) 20

Betty F. Gupton, unpublished, (Dep't Health and Human Services 1992) (App. at 12). 25

IN THE SUPREME COURT OF THE
UNITED STATES
OCTOBER TERM, 1994

BETTY F. GUPTON,
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v.

COMMONWEALTH OF VIRGINIA
RAY D. PETHEL
WILLIAM BRYANT,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Betty F. Gupton petitions this Court for a writ of certiorari to review a decision of the United States Court of Appeals for the Fourth Circuit entered on January 13, 1994.

OPINIONS BELOW

The January 13, 1994 decision of the United States Court of Appeals for

the Fourth Circuit in No. 92-1319, is a published opinion which appears at 14 F.3d 203 (4th Cir. 1994). The March 6, 1992 opinion of the United States District Court for the Eastern District of Virginia in Civil Action No. 91-358 is an unpublished decision. Hence, there is no citation reference for this opinion. App. at 6a.

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 and the Civil Rights Act of 1964, 42 U.S.C. § 1983.

STATEMENT OF THE CASE

I.

FACTS AND NATURE OF THE SUIT BELOW

This case is about a state employee with an unusual medical condition which grossly impaired her functioning when she was exposed to second-hand tobacco smoke. Yet she was obligated by her employer to work in a smoke-filled office building. Her impairments were so severe when exposed to tobacco smoke that she eventually qualified for Social Security benefits.

At the time of trial Betty Gupton had been employed continuously by the Virginia Department of Transportation for twenty-two years. Since 1986 she had been classified as a Highway Utilities Specialist. In all that time

she never received an unsatisfactory performance rating or disciplinary notice.

In March of 1990 she was moved to a new building located at 3975 Fair Ridge Lane in Fairfax, Virginia, and assigned to an open cubicle.

In July of 1990 she went on medical leave without pay, which was her status at the time of the District Court trial in March of 1992.

Initially in the building smoking was allowed through the work area, and Mrs. Gupton became "desperately ill" from the exposure to tobacco smoke. App. at 57a. While her supervisor knew about her problems, initially his only restriction of smoking was to require that employees smoke only in their

cubicles, which were open.

Her son testified that her disability was so severe that he had to prepare her meals and that she was forced to rest most of the time while at home. App. at 63a - 65a. Her supervisor testified that her impairment was so great that she would sometimes have to be taken to the emergency room from the office. App. at 56a.

Mrs. Gupton, as well as other employees complained about the smoke. App. at 62a, 65a - 66a. Finally in July of 1990, on the advice of an Assistant Attorney General working on her floor, she went on medical leave without pay and applied for disability retirement benefits. App. at 66a - 73a. A year later she filed this action seeking

damages for her suffering, back pay to July, 1990, and reinstatement in a smoke-free work environment.

Mrs. Gupton suffers from cancer, hypertension, diabetes, allergic and vasomotor rhinitis, (App. at 33a - 39a), as well as objectively determined, highly reactive asthma (App. 53a - 56a). This was the testimony of a board-certified allergist who had treated her since 1977. App. at 46a - 48a.

Additionally she may have a somatoform disorder. This is a mental disorder which causes real physical symptoms. App. at 41a - 42a. This was the testimony of the defendant's medical expert who was qualified neither as a psychiatrist nor an allergist.

Both medical witnesses agreed that

her medical disorder, whether physical or mental, caused real physical symptoms in the presence of tobacco which impaired her ability to perform a broad range of work.

Both Mrs. Gupton and her physician testified that she could return to work if the level of tobacco smoke was reduced. App. at 67a, 52a.

Mrs. Gupton's past supervisor gave expert testimony that a total elimination of smoking in the office would improve both productivity and morale. App. at 58a - 62a.

Both her fellow worker, John Leddy, and her final supervisor, William Bryant, testified to modifications of the workplace which were made after she was forced to go on medical leave

without pay. A year after she left smoking was confined by policy to closed offices, and not cubicles, or a smoking lounge. These changes only occurred when John Leddy obtained a contravention of William Bryant's policy. App. at 80a. Mrs. Gupton, although on medical leave without pay, was not notified of these changes. App. at 67a - 69a.

At no time prior to her filing suit was she offered work in a smoke-free environment. After she filed suit, a partial offer of compromise was made by the defendant, which required her to forfeit her back pay and commute to a more distant, but temporarily smoke-free environment. The trial court would not permit inquiry into this compromise. App. at 75a - 76a. Even as late as the

time of trial the state official responsible for offering accommodation to handicapped employees acknowledged that he had not done so in Mrs. Gupton's case, although he clearly regarded her as handicapped, simply because he had not been aware of her handicap. App. at 76a.

The defendant's "environmental" expert described a number of ways in which the smoking lounge could have been improved, such as providing an exhaust to the outside, rather than recirculating its air throughout the building. App. at 73a - 75a. There was no evidence of the cost of these modifications.

II

THE PROCEEDINGS BELOW

The petitioner filed suit in the United States District Court for the Eastern District of Virginia claiming that her employer, the respondent, had violated Section 504 of the Rehabilitation Act and Section 1983 of the Civil Rights Act of 1964 by not accommodating her handicap.

The district court granted the respondent summary judgment on the 1983 claim, and denying the petitioner a jury trial, held in a bench trial that the petitioner was not handicapped under the Rehabilitation Act. Civil Action No. 91-358.

On appeal the Court of Appeals for the Fourth Circuit affirmed the decision of the district court, deciding that the

petitioner was not handicapped under the Rehabilitation Act, and deciding without any discussion that the district court had properly granted summary judgment on the 1983 claim. No. 92-1319, 14 F.3d 203 (4th Cir. 1994).

REASONS FOR GRANTING THE WRIT

The Court should grant this Petition for a Writ of Certiorari because the Court of Appeals (1) disregarded material facts establishing that the plaintiff was handicapped, finding her to not be handicapped despite the finding of the Social Security Administration to the contrary; (2) interpreted a provision of federal law, unconsidered by this Court, in a way that contradicts Congress' stated

intent; (3) rendered a decision in conflict with decisions of this and other Courts of Appeal on the same matter; and (4) decided a federal question in a way that conflicts with applicable decisions of this Court. Rule 10.

1. The Court of Appeals disregarded material facts establishing that the plaintiff was handicapped and found that she was not handicapped under the Rehabilitation Act, even though the Social Security Administration found her to be disabled under the Social Security Act.

The Court of Appeals wrongly believed that an attempt to accommodate Mrs.

Gupton had been made by the employer in the form of an offer to send her to a smoke-free environment. No such offer was made. The defendant has never claimed that one was made. The record does not support the claim that one was made. The Court of Appeals can only be referring to an offer of compromise made after the suit was filed which the trial court prohibited inquiry into. App. at 75a. The official involved acknowledged that no offer of accommodation had been made, not because Mrs. Gupton was not handicapped, but because the state official was just then at the time of trial learning of her need to be accommodated. App. at 76a. The panel's erroneous belief that Mrs. Gupton had been offered a smoke-free environment

seems related to a general disregard for facts showing that she suffered a global impairment, not one isolated to peculiar form of employment as in Forrisi v. Bowen, 794 F.2d 931 (4th Cir. 1986).

Dr. Smith, Mrs. Gupton's allergist testified that he determined through a methacholine challenge that Mrs. Gupton had an usually reactive form of asthma. App. at 46a - 51a. He also testified that while there was not a true allergy to tobacco smoke, there was "no question that there are patients who are sensitive." App. at 53a. In particular reactive asthmatics, like Mrs. Gupton, have a medical disorder, an involuntary reaction to odors such as tobacco that trigger an attack. App. at 54a - 55a.

The medical expert for the defense, Dr. Witorsch, did not perform a methacholine challenge, or any other test, on Mrs. Gupton, and was therefore not in position to say whether she was truly an asthmatic. Dr. Witorsch did, however, say that asthmatics do have an irritant reaction to environmental tobacco smoke. App. at 42a - 44a. In Dr. Witorsch's opinion, Mrs. Gupton's hypersensitivity to cigarette smoke resulted from a mental disorder, a genuine medical disorder, which caused real, disabling, physical symptoms in the presence of tobacco smoke. App. at 30a.

Only Dr. Smith was in a position to know whether Mrs. Gupton was an asthmatic, and he said that she was, by

objective testing. Even Dr. Witorsch's point of view would have to admit that she could have had a reaction to tobacco smoke because of her asthma.

Witorsch and Smith agree, then, that the employee had a medical disorder that caused physical symptoms in the presence of tobacco smoke, and that as a general principle asthmatics will have an irritant reaction to environmental tobacco smoke. They differ in that Dr. Smith says she has a highly reactive form of asthma and Dr. Witorsch says she has a medical, somatoform disorder that causes real, physical symptoms.

Both lay and medical witnesses testified to the existence of an extraordinarily severe respiratory condition that massively impaired Mrs.

Gupton's functioning across a wide range of office tasks and activities of daily living. To conclude that a woman who needed someone to prepare her meals at times because of her impairment, was confined to her house at times because of her impairment, and was rushed from an ordinary white collar job to the emergency room because of her impairment, is not "handicapped" for the purposes of Section 504, is nothing short of an open defiance of the clear intention of Congress in passing that law. Just how much proof of "handicap" is necessary, before the central issues of what accommodation is due can be reached?

So apparent was the severity of Mrs. Gupton's impairment that the Social

Security Administration determined that as of the time that Mrs. Gupton had to leave active employment, or about May 1, 1991, she was disabled as that term is defined by the Social Security Act. Under the act, an individual

> shall be determined to be handicapped if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but he cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy...

42 U.S.C. §§ 423(d)(2)(A) and 1382c(a)(3)(B).

This determination was made on the basis of medical reports in the Appendix. While the defendant took issue with the claim that this impairment was worsened by exposure to second-hand smoke, nobody doubted that

she was severely impaired, or otherwise challenged the veracity of those reports.

The decision of the Court of Appeals therefore makes the definition of "handicap" more difficult to meet than the definition of "disability" under the Social Security Act, when it should be easier to meet since it is intended to be applied to working individuals.

2. The Court of Appeals has rendered an interpretation of federal law, not considered by this Court, which contradicts Congress's stated intent.

Section 505 of the Rehabilitation

Act, 29 U.S.C. § 796(8)(A), defines the term "handicapped" used in § 504. The handicap can consist of either a mental or physical impairment that "substantially limits one or more of such person's major life activities." Regulatory analysis makes it clear that the term handicapped is not restricted to just those persons who have "severe, permanent or progressive conditions that are most commonly regarded as handicaps." 45 C.F.R. Part 84 App. A. 346 (1989).

In E.E. Black, Ltd. v. Marshall, 497 F.Supp 1088 (D. Hawaii, 1980), the court held that "impairment" means: "any condition which weakens, diminishes, restricts or otherwise damages an individual's health or physical or

mental activity." Id. at 1093. A person is "substantially limited if he or she is likely to experience difficulty in securing, retaining or advancing an employment because of a handicap." Id. at 1091.

The legislative history of the Americans with Disabilities Act of 1990 reveals that Congress intended that a person be considered handicapped under that legislation if she meets the criteria for handicap under the Rehabilitation Act of 1973. The act of 1990 defined a disability with language identical to that of a handicap in the act of 1973. The House Committee Report for the act of 1990 proves that the language was meant to include a severe allergy. The report concludes that a

severe allergy, such as one that causes skin rashes or seizures, is a disability. (A40-41, 4 U.S. Cong. News '90 Bd. Vol. Legislative History at 451-52; H. Rep. No. 101-485 (II) at 28-29.)

This Court has yet to rule on whether a severe allergy may constitute a handicap under either the Americans with Disability Act or the Rehabilitation Act. However, by improperly relying on a previous case in the Fourth Circuit, the Court of Appeals has rendered a decision against the letter and spirit of the Rehabilitation Act.

The Court of Appeals looked to Forrisi v. Bowen, supra, for guidance on the question of who is "handicapped" for the purposes of § 504. Forrisi found an

employee who had a pathological fear of heights and whose job required climbing to heights, not to be "handicapped." Underlying this decision was the belief that § 504 confers positive benefits upon certain people in the same manner that the Social Security disability program does, and that plaintiffs must first qualify for these benefits. Reasonable accommodation, seen from this perspective, is a transfer of wealth from the employer to the handicapped employee, or a transfer of opportunity from all potential job applicants to the handicapped applicant. The greater the magnitude of this benefit is thought to be by a court, the more carefully it will guard access to it. By contrast, the more closely a court analogizes §

504 to the Equal Protection Clause, not requiring so much affirmative action as simple cost-effective rationality, the lower it will set the threshold qualification of proving that the plaintiff is handicapped.

As interpreted by the Court of Appeals in this case, Forrisi sets the threshold requirement of being "handicapped" so high that anyone who meets it will run the risk of being found unable to work even with accommodation. After all, Mrs. Gupton was determined to be eligible for Social Security disability benefits. Congress could not have intended that for a person with a disability to work, in a setting free from irrational barriers, she first demonstrate that her

impairment is greater than what is required to receive benefits for not working at all.

The district court noted that Mrs. Gupton was denied "disability retirement" under the State of Virginia's laws. No. 14, App. at 12a. Shortly after the trial, however, the Social Security Administration, without the necessity of a hearing before an administrative law judge, ruled that Mrs. Gupton was disabled. Betty C. Gupton, unpublished, (Dep't Health and Human Services 1992), App. at 1a-5a. Neither decision is dispositive of the question of whether Mrs. Gupton was "handicapped" for the purposes of § 504, but the fact that someone can be found "disabled" for the purposes of Social

Security and not "handicapped" under Forrisi on the same evidence suggests that Forrisi is susceptible to misapplication, and should not be a general guide in § 504 cases.

Forrisi involved an employee who had 1) an uncommon or "singular" work environment, which included scaling heights and 2) a common impairment, fear of heights. Mrs. Gupton had a 1) common work environment, a modern enclosed office building, and an 2) uncommon impairment. Her physician, Dr. Smith, who had been treating her for fifteen years (App. at 46a) concluded, after performing the methacholine challenge test, an objective test (App. at 48a): that

> she really exists as a subset of patients that is highly

> likely to be very reactive to a variety of both allergic and non-specific irritational stimuli.

While Dr. Smith noted that fifteen to twenty percent of the population have some form of asthma, he emphasized that as proven by the methacholine challenge test, Mrs. Gupton belongs to a small subset of asthmatic persons that are very reactive.

The practical and doctrinal difficulties of requiring employers to accommodate widely distributed traits such as fear of heights, near-sightedness, or even asthma do not exist in this case. Nor is the impact of this rare disorder confined to the "singular demands of a particular job." Forrisi, supra, at 934. Mrs. Gupton has an unusual combination of impairments which

include an extraordinarily severe form of asthma, which bars her from working in all office settings in the presence of environmental tobacco smoke just as surely as a set of steps would prevent a wheel-chair bound employee from working there.

Vickers v. Veterans Administration, 549 F.Supp 85 (W.D. Wash. 1982) the only decision that reached the merits of a § 504 claim based on ultrasensitivity to tobacco smoke, readily found, without requiring any medical proof, that the plaintiff was "handicapped," because working in an office that is not smoke free is a major life activity. Id. at 87. This decision still stands with respect to its definition of what a major life activity is. The proof in

this case went beyond that in Vickers to establish an impairment that sometimes interfered with Mrs. Gupton's ability to perform such activities of daily living as cooking for herself.

Mrs. Gupton's position is that Forrisi does not provide the appropriate guide for determining who is "handicappped" for the purposes of § 504, where either the work environment is ordinary, or the impairment is extraordinary, both of which are the case here. The general rule should be to rely on the testimony of a treating physician, as would be the case in all Social Security disability determinations in this Circuit. Mitchell v. Schweiker, 699 F.2d 185 (4th Cir. 1983). The focus of a § 504 action

then shifts to the question of accommodation where it belongs.

By interpreting its own holding in Forrisi to deny Ms. Gupton recovery, the Court of Appeals has applied the Rehabilitation Act in a way never intended by Congress. This Court should review the decision of the Court of Appeals to determine whether federal law has been misapplied.

3. The decision of the Court of Appeals conflicts with the logic and holdings of this and other Courts of Appeal on the same question.

Federal courts have held that conditions which radically affect the respiratory system constitute a handicap within the meaning of the Rehabilitation

Act. In Magel v. Federal Reserve Bank of Philadelphia, 776 F.Supp. 200 (E.D.Pa. 1991), a federal district court in the Third Circuit held without any discussion that the plaintiff's asthma was a handicap under the Rehabilitation Act and caused her to be absent from work. In Harris v. Adams, 873 F.2d 929 (6th Cir. 1989), the Sixth Circuit Court of Appeals denied the plaintiff recovery under the Rehabilitation Act because he had not alleged that his asthma substantially limited a major life activity. The court did not say that asthma could never constitute a handicap under the Rehabilitation Act; the test is not whether or not plaintiff has asthma, the test is whether this condition substantially limits a major

life activity. The Fourth Circuit has even held in the case of Carter v. Tisch, 822 F.2d 465 (4th Cir. 1987) that a plaintiff was handicapped by asthma, though his employer did not have to accommodate his handicap.

Additionally, the Ninth Circuit has held that "closed building syndrome," an endocrinological disorder causing lethargy, difficulty concentrating and fatigue, is a disability under § 504 of the Rehabilitation Act in Jackson v. State of California, 940 F. 2d 1534 (9th Cir 1991).

Under the logic of these cases, Ms. Gupton is handicapped as her respiratory condition does significantly impair a major life function. Even cases in other circuits denying handicapped status

offer no language or logic supporting the proposition that Mrs. Gupton's disorder is not a handicap.

As the Court of Appeals cited, there are cases in other circuits which hold that a person is not handicapped where her impairment only affects her ability to perform a task specific to the unique job in question. In Maulding v. Sullivan, 961 F.2d 694 (8th Cir. 1992), the defendant was allergic to the chemicals used in the laboratory where she was a laboratory assistant. In Miller v. AT&T Network Systems, 915 F.2d 1404 (9th Cir. 1990), the defendant was employed as a traveling repairman for AT&T, but was unable to live or work in temperatures above 90 degrees and was dismissed from his job when he was

unable to live in Phoenix as required by his job. In Daley v. Koch, 892 F.2d 212 (2nd Cir. 1989), the Court of Appeals held that a plaintiff was not considered to be handicapped by his potential employer where the New York Police Department considered him to have bad judgment.

These cases deny recovery to the plaintiff only where her ailment limits her ability to perform a specific requirement of the job in question, but leaves her perfectly able to perform other jobs. Asthma, where it substantially limits a major life function, has been held to be a handicap in the above cited circuits; no case attempts to limit the import of those holdings. While all circuits have not

expressly stated that a respiratory disorder significantly impairing a major life activity is a handicap, no circuit contests this notion. Given the precedents in each circuit, Mrs. Gupton would, almost certainly, have been considered handicapped in every Circuit except the Fourth. And even the decision of the Fourth Circuit in this case contradicts the seeming meaning of its decision in Carter v. Tisch, supra.

The petitioner therefore prays this court review the anomaly between the holding in this case and the weight of authority indicating that such a person is handicapped.

4. The decision of the Court of Appeals

is in conflict with the applicable decisions of this Court.

This Court held in School Board of Nassau County v. Arline, 480 U.S. 273, 279 (1987), that "major life activities" as intended by the statute include "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working." The plaintiff suffered from tuberculosis "in an acute form in such a degree that it affected her respiratory system" and she was hospitalized for this condition. The fact that she had been hospitalized for this impairment was more than sufficient to establish a record of impairment. Id. at 281.

The petitioner's record of

impairment is no less compelling. She has been unable to care for herself, her ability to breathe has been impaired, and she has been rendered unable to work as a result of her severe allergy to cigarette smoke. The import of Arline requires a decision contrary to the holding of the Court of Appeals.

The Fourth Circuit, also contrary to the decisions of this Court, affirmed the decision of the district court to grant summary judgment on petitioner's claims under Section 1983 of the Civil Rights Act of 1964. 42 U.S.C. § 1983. Affidavits presented by the petitioner showed that the failure to ban smoking altogether from her workplace was a deliberate, irrational act by her supervisors, Bryant and Pethel,

unrelated to any legitimate government purpose. Apart from vague, conclusory claims in the defendants' affidavits that permitting smoking among employees is good for morale or productivity, claims totally unsupported by any evidence, and rebutted by petitioner's affidavits, and the testimony of William Curtis, a retired supervisor (App. at 58a - 61a), no rationale for refusing to ban smoking was offered.

There is no question in this case that the respondents knew or should have known that there were a few unhealthy employees such as Betty Gupton in the workforce who would be hurt by anything less than a total ban on smoking, both physically and, because they would be forced to leave

employment, economically.

In the absence of any evidence justifying respondent's exposure to harm and loss of employment from a failure to ban smoking, the respondents are liable for damages to the petitioner under Section 1983 of the Civil Rights Act of 1964.

The supervisors' deliberate infliction of harm on Mrs. Gupton violates the Due Process Clause no less than if it had been done in one of the state's prisons in violation of the Eighth Amendment. Youngberg v. Romeo, 457 U.S. 307, 315 (1982). ("The right to personal security constitutes a 'historic liberty interest' protected substantively by the Due Proecess Clause.")

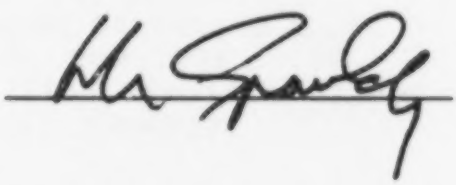
No defendant, after Vickers and Youngberg were decided, and the Surgeon General's Report on involuntary smoking was made public can legitimately claim a qualified immunity for harming an ill and vulnerable state employee through a totally irrational, and in the case of respondent Bryant, a chronic smoker, self-serving, action.

The petitioner therefore prays this Court review the decision of the Court of Appeals to determine whether the Court failed to correctly apply the decision in Arline and whether the Court incorrectly ruled that the respondents actions did not violate the Due Process Clause of the Fourteenth Amendment.

CONCLUSION

For the above reasons, the Court should issue a writ of certiorari to hear this case and to reverse the decision of the Fourth Circuit finding that the petitioner was not handicapped within the meaning of the Rehabilitation Act. No federal case offers support for the decision of the Court of Appeals and decisions of this Court and federal courts in many circuits require a contrary holding. Further, the action of the Fourth Circuit violates the substantive due process right of an individual to not be deliberately harmed by the state under Youngberg v. Romeo, supra.

Respectfully submitted,



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No. 94 -

IN THE

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October Term, 1994

BETTY GUPTON,

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Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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Social Security Notice

From: Department of Health and Human Services
Social Security Administration

Betty C Gupton

210 8th Street NE

Charlottesville, Virginia 22902

Date: Apr 26, 1992

Claim Number(s): 230-50-7534

You must meet certain medical and nonmedical requirements to be entitled to disability benefits.

We have found that you meet the medical requirements for disability benefits. An explanation of our finding is attached. Please read it carefully.

We have not yet made a decision about whether you meet the nonmedical requirements, but we will make that decision soon. Then we will send you a second notice explaining our decision. After you receive this second notice you will have 60 days to appeal the determination we made about your claim for disability benefits.

If you have any questions about your disability claim or wish to appeal our findings, please do not get in touch with the Social Security office until you have the second notice. The people at the Social Security office will be better able to answer your questions when they have the information from both notices.

After you have received your second notice, you can call or write any Social

Security office to appeal our determination or to get answers to your questions. Most questions can be handled by telephone or mail. If you go to the Social Security office in person, please take both notices with you.

DEPARTMENT OF HEALTH AND HUMAN SERVICES
Social Security Administration

EXPLANATION OF DETERMINATION

Name of Claimant	HI's Name (If CDB or DWB Claim)	SSN
BETTY C. GUPTON		230-50-753

The following evidence was considered in evaluating your claim in addition to the medical reports already in file.

F. Pepper, M.D. - report of 3/18/91; P. Neilson, M.D. - report received 2/25/92; Culpepper Memorial Hospital - records received 2/3/92; P. Smith, M.D. - report of 6/5/91.

You said that you are unable to work because of asthma, emphysema and breast cancer. The medical evidence shows you underwent a left mastectomy in 1977, for cancer with no recurrence of the disease. You have a long history of asthma and

allergies. Special breathing tests performed 8/7/91, show your respiratory condition is disabling. We can therefore, assume you were disabled several months prior to the testing. We are therefore, finding you became disabled on 5/1/91.

The determination on your claim was made by an agency of the State. It was not made by your own doctor or by other people or agencies writing report about you. Doctors and other people in the State agency, who are trained in disability evaluation, reviewed the evidence and made the determination according to Social Security law and regulations.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

BETTY GUPTON,

Plaintiff,

v. C.A. No.3:91CV00358

COMMONWEALTH OF VIRGINIA, et al,

Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Findings of Fact

1. Defendant is the Virginia Department of Transportation ("the Department"), an agency of the Commonwealth of Virginia and recipient of federal funds within the meaning of 29 U.S.C. §794.

2. Plaintiff Betty Gupton has been employed by the Virginia Department of Transportation since 1969. She started

out as a Clerk Typist and worked her way up to Highway Utilities Specialist, a position she held for approximately three and one-half (3 1/2) years until her departure from active employment with the Department in April of 1990. Plaintiff is currently on a leave without pay status.

3. Plaintiff's last assignment with the Department was in the Northern District Office which is currently located in a leased building at 3975 Fair Ridge Drive, Fairfax, Virginia. Over 300 Virginia Department of Transportation employees work in this building.

4. On March 9, 1990 plaintiff was assigned to work on the second floor of the Fair Ridge building in the Right-of-Way Section. Prior to moving to the Fair

Ridge building, management of Virginia Department of Transportation distributed a questionnaire about smoking seeking employee input into the development of a policy. Plaintiff via the questionnaire requested assignment to a no smoking area. (Plaintiff had complained about smoke at two previous locations - Culpeper and Kelly Square).

5. Plaintiff's supervisor (William Bryant) designated a wing of the Right-of-Way Section as a no smoking area. Plaintiff was assigned to the no smoking wing. This area was at least 60 feet away from a permissible smoking area. The plaintiff's office was not completely enclosed and she continued to complain about environmental tobacco smoke.

6. Bryant attempted to enforce the

smoking policy. In spite of Bryant's efforts there were occasional violations of the smoking policy. In January 1991 the smoking policy in the Right of Way Section changed again. This time the entire area was declared a non-smoking section. Smoking is only allowed in a "smoking lounge." This is the current smoking policy in effect in the Right-of-Way Section, Virginia Department of Transportation.

7. From the beginning of plaintiff's assignment to the Fair Ridge building she complained, not only about tobacco smoke, but also about paint fumes, carpet odors and formaldehyde in furniture. Plaintiff also told Cleophus Sullivan (Human Resources Officer) that she could not drive a State car because

of her sensitivity to automobile fumes.

8. As part of her job, plaintiff must frequently drive a State assigned car to various locations outside of her office.

9. One month after entering the Fair Ridge building plaintiff informed Cleo Sullivan that she was going to apply for disability (P. Ex. 13). Plaintiff cited "recycled air, smoke fumes, etc., which have settled in carpet (sic) floors, cloth cubicles..." as the reasons why she was unable to function in her job.

10. From April 13 through July 9, 1990, plaintiff was out on sick or annual leave. From July 9 until the present plaintiff has been on medical leave without pay status. Plaintiff can return

to work at the same job and salary if she wants to.

11. Plaintiff did indeed apply for disability retirement with the Virginia Supplemental Retirement System by application dated May 4, 1990. Plaintiff described her disabling condition as allergies, uneven blood pressure, inability to make spot decisions, intermittent memory loss and impaired speech.

12. In support of her disability application, plaintiff declared that she was "chemically sensitive" to a wide variety of substances, all of which made her too sick to work. On her list of substances which triggered allergic reactions were auto exhaust fumes, perfumes, marking pens, correction fluid,

freshly printed newspapers, fresh paint and new car interiors. Plaintiff also indicated that she was allergic to all products that contain Formaldehyde.

13. Plaintiff was examined by Dr. Jay Pepper, a psychiatrist in connection with her application for retirement disability. She was also examined by Dr. Robert D. Williams. Both doctors submitted reports (Def. Exhibits 4 and 5) which found no medical basis for a finding of permanent disability. Not every medical ailment is a disability. Not every sporadically or occasionally disabling medical problem is a handicap.

14. In the latter part of May, 1990 plaintiff was denied disability retirement.

15. Plaintiff now alleges that she

is particularly allergic to tobacco smoke and that said allergy qualified her as a handicapped person within the meaning of 29 U.S.C. §§ 794 and 706(8)(A). She further alleges that the failure of defendants to ban smoking from her work environment entitles her to court ordered remedies.

16. Plaintiff relies heavily upon the opinion of her allergist, Dr. Peter Smith, in support of her assertion that she is handicapped because of her allergies to cigarette smoke. Dr. Smith has treated plaintiff for a variety of allergies and hypertension since 1977. She was tested for allergies in 1977 and 1991 by Dr. Smith, who documented positive allergic reactions to a variety of substances, including tobacco, in

1977. There is no known correlation between allergies to tobacco and reaction to tobacco smoke, nor has plaintiff been tested for allergies to tobacco smoke. Plaintiff is a former smoker. Her 1991 tests revealed that her allergies had not substantially changed from the earlier test. Dr. Smith concluded that she is suffering from a "sick building" syndrome due to poor ventilation in her work environment and exposure to significant amounts of tobacco smoke, which affects her by enhancing respiratory symptoms associated with her allergic disease. Dr. Smith's suggestion that plaintiff's work environment was not adequately ventilated was based solely upon plaintiff's descriptio of her work area.

17. While plaintiff originally

alleged that she left her work with the defendant due to allergies triggered by her exposure to and irritation from a wide variety of substances in her work environment, she now asserts she is allergic only to tobacco smoke. She maintains that exposure to tobacco smoke lowers her resistance to other materials and causes symptoms, including dizziness, headaches, loss of memory and nasal congestion.

18. The Fair Ridge Drive building was tested in October of 1991 for indoor air quality by Health Buildings, International ("HBI"), a firm which specializes in such inspections. A description of that inspection, its methodology and results appears as defendant's Exhibit 12. That report

concludes that the building was equipped with adequate outside air ventilation (on the days tested); that no build-up of environmental tobacco smoke was occurring, and that there was no concentration of gases (such as carbon monoxide or carbon dioxide) over recommended national standards. The report did suggest that there could be an increase in indoor pollutants when the outdoor temperature fell below 20-25 degrees Fahrenheit due to the lack of a preheating coil for outside air.

19. There is no evidence to suggest that the Fair Ridge Drive building is a "sick building" in light of the HBI report and the absence of a pattern of employee complaints about illness in the work environment.

20. Plaintiff was examined on December 5, 1991, by Dr. Philip Witorsch, a specialist in internal and pulmonary medicine and Director of the Section of Environmental Medicine and Toxicology within the Division of Pulmonary Diseases and Allergy of the George Washington University Hospital. Dr. Witorsch reviewed plaintiff's medical history and records. While his report of her physical examination (defendant's Exhibit 14) was unremarkable, he diagnosed her as suffering from hypertension and atopic allergic diathesis based upon her medical history and records. Having examined her and reviewed the HBI report, Dr. Witorsch opined that plaintiff "does not appear to suffer from any building related illness" and that there was "no objective evidence

to support a role for exposure to environmental tobacco smoke in either the causation or exacerbation of any of Mr. Gupton's conditions...." He concluded that plaintiff suffered from a "somatoform disorder that is complicated by a belief system", and that there is "no physical or physiological condition which would prevent her from working in her former workplace" (Defendant;s Exhibit 14 at p. 11).

21. The Court finds Dr. Witorsch's evaluation of plaintiff's condition to be persuasive. It is more consistent with the facts of her work environment, work history, prior history of long term cigarette use and common sense. While the Court does not doubt that plaintiff does have severe allergies, those

allergies can and have been controlled in the past. Plaintiff suffers from a sporadic and occasionally disabling medical condition that fails to rise to the level of "handicap."

B. Conclusions of Law

Plaintiff seeks injunctive and equitable relief (including back pay and attorney's fees) for defendant' alleged violation of her rights under the Federal Rehabilitation Act, 29 U.S.C. § 794 ("the Act"). To succeed in her claim, plaintiff must establish that (1) she is a "handicapped person" within the meaning of the Act, (2) she is an "otherwise qualified" handicapped person (meaning that with or without reasonable accommodation, she can perform the essential function of her job) and (3)

defendant has failed to make reasonable accommodation for plaintiff's handicap to permit her to perform the essential functions of her job. See Fields v. Lyng, 705 F. Supp. 1134 (D. Md. 1988), aff'd 888 F.2nd 1385 (4th Cir. 1989). Plaintiff's claim fails under these tests.

1. Plaintiff is Not "Handicapped" Under the Act

Plaintiff's complaint is premised upon the assertion that she is particularly allergic "to cigarette smoke" (Paragraph 6 of her original complaint). Plaintiff has never been tested for allergies to tobacco smoke, nor is there any medically accepted testing for any such alleged allergy. She formerly smoked herself and did not

experience any allergies to her own cigarette smoke. While her allergist opined that exposure to excessive tobacco smoke in a poorly ventilated building could exacerbate her respiratory symptoms, the evidence does not support the existence of either condition. Specifically, plaintiff was placed in a no smoking work area and (except in extreme temperatures) the ventilation in the Fair Ridge Drive building was adequate, furnishing sufficient air exchange to prevent any appreciable build-up of substances found in environmental tobacco smoke. Moreover, there is no evidence that plaintiff suffers from any mental illness or delusions which would render her mentally disabled. The determination of whether

an individual is handicapped under the Act must be made on a case-by-case basis. One of the relevant inquiries in making this determination is the number and types of jobs for which the individuals is disqualified, the individual's training and expectation, and the geographical area to which the individual has reasonable access. Forrisi v. Bowan, 794 F.2d 931, 933 (4th Cir. 1986). Plaintiff has presented no evidence of any attempt to transfer to another location within the Department, although Defendant has a smaller office in Leesburg where there is little, if any, smoking by employees.

2. If Handicapped, Plaintiff is Not "Otherwise Qualified to Perform the Essential Functions of Her

Position

Upon leaving active employment with the Department, plaintiff applied for disability retirement. In that application (Defendant's Exhibit 2), she asserted she could not perform her duties because of allergies. In support of her application, she listed sensitivities to a wide spectrum of substances, including auto exhaust, fresh paint, new car interiors, etc. (defendant's Exhibits 3 and 5). According to her letter to the Virginia Supplemental Retirement System dated April 23, 1991, she is "not able to perform my job..." nor could she work "in other locations: due, in part, to her intolerance of driving her assigned vehicle (defendant's Exhibit 6). Her job requires her to drive extensively.

In light of these assertions, it was reasonable for defendant to assume that plaintiff was not "otherwise qualified" to perform her job because one of the essential functions of her job was to operate a motor vehicle. As the Court in Fields v. Lyng held:

> If [plaintiff] is thus incapable of performing his essential duties because he cannot travel safely..., then he is not an otherwise qualified handicapped person in spite of his handicap.

Fields at 705 F. Supp. 1137. Plaintiff has made no attempt to adjust to her working conditions other than to insist upon a complete ban on smoking in the Fair Ridge Drive building.

3. Defendant Has Made Reasonable Accommodations for Plaintiff's Alleged Handicapped

Even if the Court were to accept

plaintiff's assertions that she is handicapped by an allergy to tobacco smoke, the evidence shows that defendant did reasonably accommodate plaintiff's aversion to tobacco smoke by assigning her to a no-smoking area on the second floor; that assignment was made immediately upon the Department's move into the new building. After plaintiff had left active employment, defendant further restricted smoking in the building, in part, to comply with the Virginia Indoor Clean Air Act (defendant's Exhibits 7-10).

Nevertheless, plaintiff stated under oath in a pre-trial deposition that she would not return to work unless all smoking were banned in the building. The Act does not require such a drastic

policy change to accommodate one individual. See Vicikers v. Veterans Administration, 549 F. Supp. 85 (W.D. Wash. 1982). Moreover, defendant could not enforce such a ban; there are other tenants in the Fair Ridge building not under defendant's control. Accordingly, plaintiff has not carried her burden of proving that defendant has not reasonably accommodated her sensitivity to tobacco smoke.

Judgment shall enter for the Defendants.

/s/ James R. Spencer
UNITED STATES DISTRICT JUDGE

Date: March 1992

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BETTY GUPTON,
Plaintiff-Appellant,

v.

COMMONWEALTH OF VIRGINIA; RAY D. PETHEL; WILLIAM BRYANT,
Defendants-Appellees.

No. 92-1319

Appeal from the United States District Court
for the Eastern District of Virginia, at Richmond.
James R. Spencer, District Judge.
(CA-91-358)

Argued: February 1, 1993

Decided: January 13, 1994

Before RUSSELL, NIEMEYER, and WILLIAMS, Circuit Judges.

Affirmed by published opinion. Judge Russell wrote the opinion, in which Judge Niemeyer and Judge Williams joined.

COUNSEL

ARGUED: Willis James Spaulding, Charlottesville, Virginia, for Appellant. Guy Winston Horsley, Jr., Senior Assistant Attorney General, OFFICE OF THE ATTORNEY GENERAL, Richmond, Virginia, for Appellees. **ON BRIEF:** William H. Scheil, Jr., Rockville, Virginia, for Appellant. Mary Sue Terry, Attorney General of Virginia, Gail Starling Marshall, Deputy Attorney General, Neil A.G.

McPhie, Senior Assistant Attorney General, OFFICE OF THE ATTORNEY GENERAL, Richmond, Virginia, for Appellees.

OPINION

RUSSELL, Circuit Judge:

Betty Gupton, an employee of the Virginia Department of Transportation (VDOT), appeals the district court's grant of summary judgment against her on her claim that VDOT's failure to provide her with a smoke-free workplace violated 42 U.S.C. § 1983. She also appeals the district court's rejection, after a bench trial, of her claim that this failure also violated section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794. We find no error in the district court's orders and affirm.

I.

Gupton was employed, beginning in March, 1990, as a highway utilities specialist at the VDOT's Fair Ridge office in Fairfax, Virginia. Gupton, who claims that she is allergic to or irritated by tobacco smoke, requested that the VDOT assign her to a cubicle in a non-smoking area of the office. Gupton's supervisor complied with her request, designating a wing of the office as a non-smoking area and assigning her to a cubicle in that wing that was located at least sixty feet from the nearest permissible smoking area. Gupton maintained, however, that she was still affected by the tobacco smoke in this new office arrangement. As a result, approximately one month after she had begun at the office, she took unpaid leave and has not returned to work there.

Gupton brought this action against the Commonwealth of Virginia and two of her superiors at the VDOT in the Eastern District of Virginia, claiming that the VDOT's failure to provide for her a smoke-free work environment violated 42 U.S.C. § 1983, by depriving her of her rights to due process and equal protection, as well as section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794. The district court granted summary judgment against Gupton on her section 1983 claim and, after a bench trial, rejected her section 794 claim as well.

II.

The most significant issue raised by Gupton's appeal is whether the district court erred in rejecting her section 794 claim.[1] We find that it did not.

To prevail on her section 794 claim, Gupton had to establish that she was an "individual with handicaps" under that provision.[2] 29 U.S.C. § 794(a); *Forrisi v. Bowen*, 794 F.2d 931, 933 (4th Cir. 1986). An "individual with handicaps" is defined, in pertinent part, as "any person who . . . has a physical or mental impairment which substantially limits one or more of such person's major life activities." 29 U.S.C. § 706(8)(B). In its regulations, the Equal Employment Opportunity Commission has stated that the term "major life activities" means "functions . . . such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29 C.F.R. § 1613.702(c). Gupton contends that she qualifies as a handicapped individual within the meaning of section 794 because she showed that her allergy to tobacco smoke was a physical impairment which substantially limited one of her major life activities, that activity being working.

To establish that her tobacco smoke allergy substantially limited her ability to work, Gupton had to show not merely that her allergy made her "incapable of satisfying the singular demands of a particular job," *Forrisi*, 794 F.2d at 934, but that it "foreclose[d] generally [her opportunity to obtain] the type of employment involved," *id.* at 935. In *Forrisi*, for example, a utility systems repairer, whose job required him to climb stairways and ladders, claimed that his acrophobia, or fear of heights, substantially limited his ability to work because it pre-

[1]Gupton also argues that the district court erred in granting summary judgment against her on her section 1983 claim, which alleged that VDOT's failure to provide her with a smoke-free workplace violated her rights to due process and equal protection. We find that this argument is completely without merit, and reject it without further discussion.

[2]In an amendment to section 794 enacted after the trial, the term "individual with handicaps" was replaced with the term "individual with a disability." The two terms, however, are defined identically. *See* 29 U.S.C. § 706(8)(B).

vented him from performing his particular job. We rejected this claim, finding that while the repairer was, as a result of his acrophobia, "unsuited for one position in one plant," *id.*, he had shown "no difficulty in obtaining other jobs in his field," *id.*[3]

Gupton failed entirely to make this showing. While she did introduce evidence that her allergy to tobacco smoke made her unable to continue in her current position working as a highway utilities specialist in the VDOT's Fair Ridge office, she presented no evidence that her allergy foreclosed her generally from obtaining jobs in her field. To the contrary, in fact, after Gupton had left its Fair Ridge office, the VDOT offered her a position in her field at its nearby Leesburg office, which was smoke-free. She never responded to this offer.

Gupton, therefore, did not establish that her allergy to tobacco

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[3]The other courts of appeals that have addressed the issue have almost unanimously agreed with our holding in *Forrisi* that, in order for a plaintiff to establish that he has an impairment that substantially limits his ability to work, he must show more than merely that the impairment barred him from one particular job. *Cook v. Rhode Island, Dep't of Mental Health, Retardation, & Hosps.*, No. 93-1093, 1993 U.S. App. LEXIS 30060, at *23-*24 (1st Cir. Nov. 22, 1993); *Chandler v. City of Dallas*, 2 F.3d 1385, 1392-93 (5th Cir. 1993); *Byrne v. Board of Educ.*, 979 F.2d 560, 565-66 (7th Cir. 1992); *Welsh v. City of Tulsa*, 977 F.2d 1415, 1419 (10th Cir. 1992); *Maulding v. Sullivan*, 961 F.2d 694, 698 (8th Cir. 1992), *cert. denied*, 113 S. Ct. 1255 (1993); *Miller v. AT & T Network Sys.*, 915 F.2d 1404, 1404 (9th Cir. 1990) (adopting district court opinion at 722 F. Supp. 633 (D. Or. 1989)); *Daley v. Koch*, 892 F.2d 212, 215 (2d Cir. 1989); *Jasany v. United States Postal Service*, 755 F.2d 1244, 1250 (6th Cir. 1985).

Only the Eleventh Circuit has reached a different conclusion, in *Fitzpatrick v. City of Atlanta*, 2 F.3d 1112 (11th Cir. 1993). There plaintiffs were barred from serving as firefighters for the city because they had a skin condition that prevented them from shaving, and the fire department, for safety reasons, had a no-beard rule. The court, without making any further analysis or examining any caselaw, stated that the "firefighters would seem to qualify as handicapped individuals" under section 794 because their skin condition "substantially limit[ed] [their] ability to . . . work on account of the no-beard rule." *Id.* at 1126 (quotations omitted).

smoke substantially limited her ability to work, and she did not assert that it limited any other of her "major life activities." As a result, she failed to show that, on account of her tobacco smoke allergy, she was an "individual with handicaps" for the purposes of section 794,[4] and, thus, she was not entitled to recover under that provision.[5]

[4]We recognize that the court in *Vickers v. Veterans Admin.*, 549 F. Supp. 85 (W.D. Wash. 1982), addressed a factual situation similar to the one presented here and reached the opposite conclusion. In *Vickers*, an employee who was hypersensitive to tobacco smoke brought a section 794 claim against his employer, the Veterans Administration, for failing to provide for him a smoke-free workplace. The court concluded, without further discussion, that the employee qualified as handicapped because his hypersensitivity "limit[ed] at least one of his major life activities, that is, his capacity to work in an environment which is not completely smoke free." *Id.* at 87.

It appears that *Vickers* is no longer good law because its reasoning conflicts directly with the Ninth Circuit's later opinion in *Miller v. AT & T Network Sys.*, 915 F.2d 1404 (9th Cir. 1990). *Miller* expressly adopted the district court's opinion, *Miller v. AT & T Network Sys.*, 722 F. Supp 633 (D. Or. 1989). *Miller*, 915 F.2d at 1404. The district court's opinion states that, in order for a plaintiff to establish that he has an impairment that substantially limits his ability to work, he must show that it "substantially limit[s] [his] employability generally," *Miller*, 722 F. Supp. at 639. Because *Vickers* allowed the plaintiff to establish that he was handicapped merely by showing that his hypersensitivity to smoking substantially limited his ability to obtain a job in a non-smoke-free workplace, and did not require that he establish that it substantially limited his employability generally, *Miller* seems to have effectively overruled it.

Moreover, even if *Vickers* was still good law, it also conflicts directly with *Forrisi*, where we stated that, for an impairment to substantially limit a plaintiff's ability to work, it must "foreclose generally [his opportunity to obtain] the type of employment involved," *Forrisi*, 794 F.2d at 935, *i.e.*, foreclose him generally from obtaining jobs doing the type of work plaintiff has chosen as his field. As a result, we must reject the analysis and holding of the *Vickers* court.

[5]Gupton also contends that the district court erred in not allowing her a jury trial on her section 794 claim, which she requested. We need not address this contention. Had the district court allowed Gupton to try her section 794 claim before a jury, the district court properly would have granted judgment as a matter of law against her, Fed. R. Civ. P. 50(a), because, as we stated, her evidence did not even approach making the showing necessary to establish that she was a handicapped individual. As a result, her claim would not have been decided by the jury, and, thus, any error in refusing her a jury trial was necessarily harmless, Fed. R. Civ. P. 61. *See Sailor v. Hubbell, Inc.*, 4 F.3d 323, 327 (4th Cir. 1993).

III.

For the reasons stated, we affirm the district court's orders granting summary judgment against Gupton on her section 1983 claim and rejecting, after a bench trial, her section 794 claim.

AFFIRMED

ALLERGY ASSOCIATES OF FREDERICKSBURG, INC
PEDIATRIC AND ADULT ALLERGY AND INTERNAL MEDICINE
PETER R. SMITH, M.D.
416 BRIDGEWATER STREET
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DIPLOMATE AMERICAN BOARD OF INTERNAL MEDICINE

DIPLOMATE AMERICAN BOARD OF ALLERGY & IMMUNOLOGY

May 4, 1990

Virginia Department of Transportation
P.O. Box 671
Culpeper, Virginia 2201

RE: Ms. Betty F. Gupton

Dear Sir:

This is to advise regarding the on-going ill health of my patient, Ms. Betty Gupton. Ms. Gupton has a long history of allergic and vasomotor rhinitis and sinusitis and has continued to experience symptoms of chronic headache, malaise, diffuse arthralgias and fatigue which she relates to poor ventilation in her present work spot. Complicating this

picture is the fact that she has very significant hypertension requiring daily medications for control as well as the recent onset diabetes mellitus.

I ask that every consideration be given to providing an optimum work environment for this patient.

Peter R. Smith, M.D.

PRS:jl

D: 4-27-90
T: 4-4-90

ALLERGY ASSOCIATES OF FREDERICKSBURG, INC
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DIPLOMATE AMERICAN BOARD
OF INTERNAL MEDICINE

DIPLOMATE AMERICAN BOARD
OF ALLERGY & IMMUNOLOGY

June 5, 1991

TO WHOM IT MAY CONCERN:

Re: Betty Gupton

Mrs. Betty F. Gupton has been followed through my office since 1977 at which time she presented with symptoms of allergic rhinitis and asthma. She was evaluated for allergic disease and found to be skin reactive to a variety of inhalant allergens. Additional medical problems include cancer of the breast, which required a radical mastectomy, and hypertension.

In the last 14 years Mrs. Gupton has been managed primarily through the use of allergy medication and allergen avoidance. Her symptoms have consisted mainly of intermittent sinus congestion pain, headache, occasional migraine and psychomotor symptoms including intermittent memory loss, anxiety and depression. A tension fatigue state often associated with allergic disease has also been a significant complaint. Mrs. Gupton's upper respiratory symptoms had been reasonably well controlled until an environmental work change occurring in March of 1990. The particular work environment was one having very poor ventilation with no windows or doors to the outside and no fresh ventilation with no windows or doors to the outside and no

fresh air intake. Smoking was allowed in much of the building increasing the likelihood of passive smoke inhalation. I am unaware of any air sampling testing done in this particular environment looking for concentrations of carbon monoxide, formaldehyde, particulate matter or volatile organic components but this environment as described above is the typical "sick building" syndrome environment causing problems with many patients. In addition Mrs. Gupton has noted a marked increase in her sinus congestion symptoms during her work activity which involved automobile travel, especially when exposed to considerable automobile exhaust.

Despite attempts to control her symptoms while working in the above mentioned work

environment the patient continued to have symptoms of incapacitating headache, nasal and sinus congestion and fatigue which in turn has aggravated her hypertension. Mrs. Gupton had to terminate her work in the above mentioned environment because of the persistent of symptoms mentioned above and cannot return unless optimum ventilation of the work place is achieved including removal of all second hand tobacco smoke as well as of the documented particulates and volatile organic compounds.

There is no question that Mrs. Gupton is significantly disabled from her sensitivity to numerous gases and particulates, especially when they are present in higher than normal concentrations. A well ventilated work

place would very likely be associated with a significant reduction in symptoms. At this time Mrs. Gupton continues to remain symptomatic albeit improved since terminating her employment. She continues to take anti-hypertensive medication on a regular basis as well as anti-histamine decongestant medication. Should you have any further questions regarding this report please do not hesitate to get in touch with this office.

Peter R. Smith, M.D.

PRS/vrd

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

BETTY GUPTON Case No.
v. 3:91CV00358
COMMONWEALTH OF VIRGINIA, et al.

January 13, 1991
Fairfax, Virginia

The de bene deposition of PHILIP WITORSCH, M.D., taken at the instance of the defendant, before Sherall W. Dementri, a Notary Public for the State of Virginia at Large, beginning at 2:00 p.m. at the Northern Virginia District Office of the Virginia Department of Transportation, 3975 Fair Ridge Lane,

Fairfax, Virginia, said deposition taken pursuant to the Federal Rules of Civil Procedure.

* * *

Q Well, you agree she does experience real physical symptoms as a result of exposure to tobacco or to tobacco smoke?

A Yes, I think she probably does.

Q And do you agree that these symptoms that she experiences impair her ability to work, based on your review?

A I think those symptoms may impair her ability to work again, not on a physical basis, but on a psychological or psychogenic basis.

Q May impair or did, in fact, impair?

A Well, I can't tell for certain.

They may have impaired. I can't say they did impair, because I have not seen her at the time she was having those symptoms, and I would have to see her to say if they did impair her. Historically, they would have appeared to have impaired her. . .

* * *

Q And it's your general opinion that even if you took an asthmatic such as Mr. Gupton [sic] and placed her in a room which was intensely filled with tobacco smoke that that would not induce any change in her pulmonary function; is that your general opinon?

A No, that's not my opinion. If there's sufficient levels of tobacco smoke, an asthmatic may react on an irritant basis. I don't think it's an

allergic reaction. And there's studies in the literature where asthmatics have been put into exposure changes, and some studies show a reaction, and some don't. The best, most recent studies show a certain segment of the subject patients develop decreased air flow, but that doesn't correlate with other evidence of allergy to tobacco antigens. So that in some of these cases it's an irritant reaction. And clearly if you have poor ventilation and high levels of tobacco smoke, it will act as a nonspecific irritant. I'll [sic] not sure that is unique to tobacco. It's one of many substances that can have an irritant in high enough concentrations.

I believe particularly an asthmatic will react. But I don't have

the sense Mrs. Gupton was having asthma reaction in most of her symptoms. The symptoms that are in the record and that she was relating to me were symtoms other than asthma.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

BETTY GUPTON,

Plaintiff,

v.

COMMONWEALTH OF VIRGINIA and
RAY D. PETHEL and WILLIAM
BRYANT,

Defendants

February 5, 1992
Richmond, Virginia
9:30 a.m.

BEFORE: HONORABLE JAMES R. SPENCER
United States District Judge

APPEARANCES:

WILLIS J. SPAULDING, ESQ.
WILLIAM B. SCHEIL, JR., ESQ.
210 Eighth Street N.E.
P.O. Box 1774
Charlottesville, VA 22902
Counsel for Plaintiff

GUY W. HORSLEY, JR., ESQ.
Office of the Attorney General
101 North Eighth Street
Richmond, VA 23219
Counsel for Defendant

Testimony of Peter R. Smith

By: Mr. Spaulding

A Betty Gupton was first referred to me by a Culpeper physician in February of 1977, and it was at that time she presented to my office with a chief complaint of bronchial asthma. Her symptoms then were primarily that of shortness of breath, cough, wheezing, with associated nasal symptoms that I felt was related to accompanying sinusitis.

She was referred primarily to evaluate whether or not there were any allergic symptoms or disease that might be present that would be aggravating, and for the management of reactive airway disease. I'm referring to asthma, which is what that condition is. It is a

condition where the bronchial tubes are hyperreactive to a variety of stimuli, both allergic stimuli as well as a variety of other stimuli: cold air, dry air, whatever. So she was evaluated at that time and that was in February of 1977. And she had pulmonary function studies done, which are studies to determine to what extent she is obstructed as far as her air flow is concerned, and to what extent how reversible this process is.

She had pulmonary function studies done then showing, documenting in as objective a way as possible, obstruction which was consistent with obstructive airway disease, and also, the fact it was reversible. She would be given a dilator by inhalation and it would reverse. That

was the first time she was evaluated, skin-tested, and shown to be reactive to a variety of inhalant allergies, and was started on medication to treat the condition. . .

* * *

Secondly, the second primary diagnosis is that of bronchial asthma. She recently underwent what we term a methacholine challenge. Methacholine challenge is where we stimulate asthma. If I take a normal patient without any history of airway hyperactivity, and give them by inhalation, in a very standardized fashion, they will not drop down their pulmonary function. Meaning you just don't become obstructed. You may cough a little bit with it, be irritated by it, but you will not

decrease the air flow. Ms. Gupton was given the methacholine challenge in my office, and after receiving approximately 12 milligrams accumulated dose, she had dropped her pulmonary function by 20 percent, which is the point at which we stop. And then she had to get a breathing treatment in order to reverse that effect.

This is a type of test we use to objectively diagnose asthma. She really has had that diagnosis made on the basis of being found obstructed and then given a bronchodilator and opening back up again and returning to near normal. That is really a very reasonable way of making a diagnosis. But what the methacholine challenge does is it really objectifies things to the extent that we know that

even right now, she has hyperreactive airways, and we know that people with hyperreactive airways, or asthma, even though there may be times where she is asymptomatic, that when they are exposed to a variety of stimuli -- not just allergic stimuli, but whether it be environmental tobacco smoke, and it can be very low concentrations, and it is not the carbon monoxide in tobacco smoke, not the particulant matter which we are measuring in these buildings, but it is something else that causes this irritation -- that when this occurs, she will very likely have a noticeable fall in pulmonary function.

So the two primary diagnoses are that of allergic rhinitis and its associated problems, bronchial asthma and

all the associated problems there. So she really exists as a subset of patients that is highly likely to be very reactive to a variety of both allergic and non-specific irritational stimuli.

Q Dr. Smith, based on this diagnosis and your experience with Ms. Gupton, do you have an opinion whether or not these disorders substantially impair major life activities for her?

A They need not as long as she is able to avoid a lot of the irritational stimuli that can cause problems.

Now you know asthma, allergic disease, exists in 20 percent of the people, 15 to 20 percent of the people in the United States. Asthma is also a very common illness. It is the most common illness that causes absenteeism in

schoolchildren, the most common chronic illness. So it is a very common condition. And people certainly live with that. But there are patients who are much more sensitive than other patients. And yes, she can live, she can work, as long as the environment is such that she is not exposed to the amount and here, I don't know what the amount of exposure she can tolerate is, and only she can determine that. But I think there is no question she can work very actively in a work environment where there is a minimum amount of indoor pollution, which may or may not be related to ventilation.

* * *

CROSS EXAMINATION

By: Mr. Horsley

Q In your specialty, there is no generally-accepted medical test for allergies to tobacco smoke; is that correct?

A That's right. We don't recognize a true allergy to smoke. It is a sensitivity. There is no question that there are patients who are sensitive.

* * *

RE-DIRECT EXAMINATION

By: Mr. Spaulding

Q I gather it is your testimony that Ms. Gupton is a true asthmatic?

A She is, without any question.

Q And is that based strictly on subjective patient reports?

A It is not. It is based on a methacholine challenge; it is based on following her for the last 17 years, or

rather 13 years; and her response to bronchodilator medication on pulmonary function testing.

Q But if she were were [sic] not, if she were among the group of the asthmatics you described who reacted to salt water that was suggested to have something in it offensive, would that be medical phenomenon or is that malingering or what?

A No, that's a medical phenomenon. She has hyperreactive airways that can respond to a variety of stimuli, even including emotional stimuli.

Q Is there a voluntary element in these people who react to it?

A No, there is not a voluntary element. This is primarily mediated through the central nervous system, the

vagus nerve network, the cholinergic nerve network. It is the same nerve network that if she inhales cold air, it going to precipitate asthma.

Q In these group of people, in your discussion with Mr. Horsley regarding people who react to odors possibly before or independent of the underlying irritant or allergen, are these people experiencing a medical disorder?

A They are experiencing a medical disorder. The most recent materials have shown that the only patients, virtually the only patients that respond to odors are the methacholine-positive patients, that have methacholine sensitivity, which are the true asthmatic.

Q And their reaction, is it a medical reaction or simply a preference to be

away from the odor?

A It is a medical reaction. Their air resistance goes up. These studies were done by body plethysmographs, measuring total lung resistance, which is the most sensitive way of measuring resistance.

* * *

Testimony of William R. Curtis

By: Mr. Spaulding

At times she would get so sick that either myself or a co-worker together, one would take her home and the other would pick her up, things like that. She had to be rushed home. We have taken her to the emergency ward at the hospital on several occasions. We have taken her to her daughter's, where she was cared for. There have been many cases like that, but it happened starting right in that area.

* * *

Q Earlier in your testimony you described incidents when she had to be taken home by you or other employees. To your knowledge, why did she need to be taken home?

A Well, she was so desperately ill, and of course we all rode together, all three of us, up from Culpeper in a pool. She had to be taken home because at times I thought she was either going to pass out and die -- I mean, it scared me to death. Of course she had to get to the doctor somewhere, either emergency or go home, and her daughter was so familiar, that's where she wanted to go is she was going to die on the way, and that's why we took her. Because she was absolutely unable to function. She was practically

off of her feet.

Q On this occasion, was she able to answer the phone and do the other duties of her job?

A Absolutely not. When she became completely saturated, she was not even able to perform the very simplest job that you could give her, ana at times she couldn't even tell you the time of day or tell you what her name was. . .

* * *

Testimony of William R. Curtis

By: Mr. Spaulding

Q In your experience as a manager in the Department of Transportation, have you had an opportunity to observe the effect of smoking policies on employee morale?

A Absolutely.

Q And what if any effect does the restriction of smoking have on employee morale?

MR. HORSLEY: Objection. I don't think he is competent to answer the question.

THE COURT: No, he can answer it.

THE WITNESS: I think really what happens in the course of general discussion, that you feel that you are fighting a lost battle. Because people get so sick of it, it interferes with their operation. It confuses them. And if you are working in an organization where you have, say, probably five people smoking out of 20-some, nothing appreciably seems to be done. I stand to be corrected, maybe it was being tried,

but not to my knowledge. Morale has to be on the downgrade because you think no one whatsoever is looking out for you. You are thinking of your health. And you can come into that office, say if you come in there feeling like one million dollars, and you get saturated with all that heavy stuff that hits you in the face, it won't be long before you are wondering if you are going to be able to take it.

Q That's the effect of smoking on the non-smokers. Is there an effect on the productivity of the smokers by obliging them to use a smoking lounge or something else, in your experience?

A It could affect both because if you are going to be smoking, based on my observation over the many years that I

have been associated with the department before my retirement, that you are going to find people that will take that extra cigarette and say if they are going to go to a lounge they are going to go to that lounge or they are going somewhere and get that cigarette. And if you allow it in your office and they are smoking, they are going to disturb somebody else with a little casual conversation, and when you disturb a number of people over a period of days you have lost a lot of man hours. It is certainly going to be detrimental to productivity. And I believe this with all my heart. Because there is so many things that cigarettes are -- to take them out of the pack, take the matches out and light them if you are a chronic smoker, that don't take much time. But

the time involved that you have of always trying to think of ways that I can get that cigarette and smoke it, I can go to the restroom, I can get that extra cup of coffee, all that adds up. I think it is very degrading to productivity. . .

* * *

Testimony of John T. Leddy, III

By: Mr. Spaulding

Q Were you aware of any complaints about smoking that Ms. Gupton had made before her leaving?

A Very aware. Betty, I had heard her complain when she worked, prior to moving to the Northern Virginia District, I was aware that she was extremely allergic to cigarette smoke. And in the Northern Virginia District the initial location for our office, the word "stench" is not

strong enough to convey what one sensed when they walked into our office. It was absolutely filthy with cigarette smoke. And Betty complained of it constantly, as did quite a few other people. . .

* * *

Testimony of Lee Charles Gupton

By: Mr. Spaulding

A At times she needed help with meals being prepared. My sister would help with that upon occasion. She needed assistance driving to and from town. I had helped her occasionally, but not as often as my sister.

Q And did this situation improve or worsen after she stopped going to work in Fairfax?

A It took a few months before it improved, but she did improve somewhat.

Q Can you describe for the Court, give the Court some idea of the frequency with which she needed assistance in the preparation of meals?

A Do you mean when she first quit work?

Q Well, before she quit work.

A To be honest, I can't answer that truthfully as to how often she needed help. Because like I said, my sister helped her more often than I did.

Q And when you helped her, what kinds of things would you do?

A I would prepare meals for her. I would remove the trash from the house and take it to the dump for her. Occasionally take her to town.

Q What condition was she in? I know you are not a doctor, but can you

describe what she was doing while you were preparing the meal during this period of time?

A Well, she would rest most of the time. She would sit back in a chair and take it easy. If she ever attempted to do anything that was really physical, like cleaning the house, she would get exhausted very quickly. She would also have coughing spells and spitting up some kind of a phlegm or something. . .

* * *

Testimony of Betty F. Gupton

By: Mr. Spaulding

Q Did you tell your supervisor about the problem your were having?

A Yes, sir. He was very much aware of it and he told me anything I could do to get away from the situation in the

office, to do so. He even made special assignments where I could go ahead and work outside of the office.

Q What was it that you complained about to your supervisor?

A Mainly, tobacco smoke. I felt like if this was eliminated, and if they had a smoking lounge and it would have been in effect, I feel like I may have been able to function. And I'm not a doctor, and I know I have a lot of allergy problems and I don't completely understand all of my health situations. And I learned quite a bit from Dr. Smith this morning.

Q Was there ever a time that your supervisor of\r Mr. Bryant or somebody else connected with the Virginia Department of Transportation offered to assist you in some respect with the

health problems that you complained about?

A Well, I did talk to Paul Stahl on numerous occasions before John Leddy was moved into my office. And I would be coughing in there, and he would hear me and I would complain about smoking. I was wishing that something could be done. But as far as any assistance being done, no, from anyone. . .

* * *

Q Do you believe that you would be able to work in the Fair Ridge Drive office if smoking were reduced or eliminated?

A Yes, I believe I could function. . .

* * *

Q Has there been a time subsequent to your going on medical leave without pay

that there was an offer to fix up the Fair Ridge office for you so that you could come back?

A Mr. Hull said that they were trying to get something done; that hopefully, in the future, they would have a smoking lounge.

Q When was it that you learned that there was a smoking lounge?

A I did not learn anything about the smoking situation or the additional things that took place until in June, May or June of the summer of 1991.

Q To the best of your present knowledge, are you entitled to return to work right now at the VDOT office on Fair Ridge Drive?

A Not that I know of. They say that my job is still there, but I've seen

nothing in writing. . .

* * *

Q Was there a time when you sought advice from Mr. Stahl? [the Assistant Attorney General on your floor]

A I spoke to him on numerous occasions because his office was beside mine before Mr. John Leddy was moved in that office, and he would sympathize with me. He had a lot of problems towards smoking; it bothered him. And he was developing a cough.

MR. HORSLEY: Objection to anything that he told her as hearsay.

THE COURT: Sustained.

MR. SPAULDING: Your Honor, if I may be heard on this point --

THE COURT: No. It is not a major deal. You have brought out on

several occasions this advice, supposedly sought of Stahl. Stahl has said they had conversations about it, that he didn't like smoke, that she didn't like smoke. You asked her questions about it. She said, "Yes, he sympathized with me." Same thing. She didn't like it, he didn't like it.

THE WITNESS: Your Honor --

MR. SPAULDING: Just a minute. Your Honor, this line of questioning goes toward -- first of all, it is not hearsay because I'm attempting to explain why it is the plaintiff pursued a disability retirement application, and intend to show that it was on the basis of the conversation with Mr. Stahl. It doesn't go to the truth of what Mr. Stahl said.

THE COURT: Ask her straight

up. Did Mr. Stahl advise you to do it? You don't have to beat around the bush.

BY MR. SPAULDING

Q Did Mr. Stahl assist you in your disability retirement application in some respect?

A Yes.

Q How?

A he gave me the name of an attorney in Alexandria and he said he wished me luck on it.

Q Was this after you had laid before him your medical problems and confided in him?

A Yes, sir.

Q Did he advise you that you had any rights as a handicapped individual?

MR. HORSLEY: Objection, Your Honor. This goes beyond any relevance.

THE COURT: She can go ahead and answer the question.

THE WITNESS: Would you please repeat it?

BY MR. SPAULDING:

Q Did Mr. Stahl advise you at any time that you had rights as a handicapped individual under federal law?

A I believe he did. But I can't say a date or a time.

Q Was it in this conversation when he referred you to the disability or workers' comp lawyer?

A Yes.

Q And did he ask you to keep the conversation secret?

A Yes.

Q Why was it that you applied for disability benefits?

A Simply because I didn't know of any other alternative that would bring about action. And at the time, I was so sick and I had all these other problems that had been brought on, that I just felt that was the way to go. . .

* * *

Testimony of Simon Turner

By: Mr. Spaulding

Q What can be done to improve the smoking lounge?

A The smoking lounge could be improved by installing an exhaust, which would be tied into the toilet exhaust, probably. And you would then use what is called transfer air from another part of the building to ventilate that smoking lounge. And you would probably want to ventilate it to ASHRAE standards for

designated smoking areas of 60 cubic feet per minute per person.

Q What are some other measures that could be taken regarding the ventilation?

A Well, we noticed in the wintertime that this building was not equipped with heating coils on the outside air intake, and it is possible under extreme load temperatures that you would not be able to bring outside air into the building during the winter period, and only during the winter period, because you would basically be running it through to the diffusers without any heat in the perimeter areas of the building. Well, throughout the AV system, actually. And therefore, one way to improve ventilation throughout the year would be to install some kind of heating system in the

outside air intake so you could guarantee that you could bring outside air into the building even in very cold conditions. .

* * *

Testimony of Charles Sullivan

By: Mr. Spaulding

Q Are you aware that the state has conditioned Ms. Gupton's placement in the Leesburg office on her waiving any claim to back pay?

MR. HORSLEY: Objection. That's not appropriate evidence before the Court.

THE COURT: Sustained.

BY MR. SPAULDING:

Q Have you ever offered to place Ms. Gupton in a smoke-free environment; have you talked to her and offered that?

A No, I have not talked to Ms. Gupton

in -- well, I talked to her a few minutes ago when I saw her in the anteroom. . .

* * *

Q What possibilities did you discuss with her other than her going home without a paycheck in April of 1990?

A I did not discuss any possibilities with Ms. Gupton in April of 1990 because smoking was never an issue. The smoking just became an issue based upon what I have read in the last couple of months.

Q You were unaware in April of 1990 that she had a problem with smoking?

A That is correct.

Q Those complaints never reached you?

A Never reached me.

* * *

Testimony of William R. Bryant

By: Mr. Spaulding

Q Mr. Bryant, is it your testimony here today that Ms. Gupton is faking her symptoms?

A I didn't say that. I said I do not believe the severity with which the symptoms have been stated.

Q Do you think that she does not have all the illnesses Dr. Smith says that she has?

A I'm sure that Betty suffers from a variety of different things, including allergies and irritants. What I said was that there were other people on my staff with similar supposed reactions to the same products, and they have not been affected in the same way.

Q Do these other individuals have asthma, allergies, diabetes, hypertension, and cancer?

A I can't say if they do or they don't.

Q Do you know any of them that do have even one of those disorders?

A The girl that testified earlier today has a documented case of extreme sensitivity to tobacco smoke, which is the essence of this case.

Q You have described to the Court how the restrictions contained in Exhibit 10, I believe it is in the exhibit book in front of you, those are the restrictions of May 31st, 1991.

As I understand your testimony, these restrictions came about by Mr. Leddy going over your head to Mr. Garber; is that correct?

A That's a correct chain of events.

Q They could have also come about if

you had conveyed to Mr. Garber Mr. Leddy's complaints, could they not?

A That's not the intent of the policy. That's not the intent of the policy the way it has been explained to the section heads within the district office.

Q Help me with your understanding of how Mr. Leddy is supposed to obtain relief under this policy?

A Exactly the way he did, by going to the district administrator.

Q There is not role for his complaining to you?

A He had already complained to me. I had already give my answer. I had made the changes that I could make to try my answer. I had made the changes that I could make to try to satisfy Mr. leddy, as well as the rest of the staff, and

that was the limit of my authority. If he was to receive any assistance or relief under this policy, it was necessary for him to go to the district administrator.

Q Your authority did not extend to going to Mr. Garber and asking for the change to accommodate __

A I advised Mr. Garber, I advised Mr. Ogle, that there were certain people on my staff that had a problem with smoking in the open cubicles.

Q Yet that would not result in a change of smoking practices until the employee went directly to Mr. Garber.

A That's correct.

Q Did you advise Mr. Garber of Ms. Gupton's aversion to tobacco smoke?

A I can't recall that I did.

Q Did you advise Mr. Sullivan, who has just testified here, of Ms. Gupton's aversion to tobacco smoke?

A No, sir.

Q Who did you inform of Ms. Gupton's complaints regarding. . .

Q The original smoking policy prohibited smoking in open areas where occupants of the building objected; is that correct?

A An open area is where the occupants of the building objected? I'm not certain it is correct. Smoking was allowed in cubicles --

Q Well, I'm referring now to the letter of August 31st, 1990. Actually, I can work from any one of these. You might look at Exhibit 8. The third from last paragraph in this letter from Mr.

Garber: "Within open work areas, employees may be allowed to smoke in their immediate work areas provided the employees in that area agree to allow smoking. However, if one or more employees complain of passive tobacco smoke, and accommodation efforts fail, the areas shall be declared non-smoking." That's your understanding of the policy?

A "...shall be declared non-smoking by the district administrator."

Q Right. And can you tell me why it was that the open area in which Ms. Gupton worked, and in which she complained of exposure to tobacco smoke, and in which Mr. Leddy worked and complained of exposure to tobacco smoke, and in which Mr. Stahl worked, why it was that smoking continued in that area after

complaints of smoking?

A There was no smoking in that area.

Q Is that area -- is there a barrier of walls or doors between that area and the area in which smoking was permitted.?

A No, sir, there isn't.

Q Why did smoking continue in that area?

A It did not continue in that area. The smoking stopped at Sandy Rapier's office, which is outside that area. According to the HBI report there is no carry-over, due to the ventilation system in that office, of tobacco smoke. And there was no smoking of lighted cigarette or pipe products in the area in question.

MR. SPAULDING : No further questions?

THE COURT: All right. You may

stand down.

(Witness stood aside.)

MR. HORSLEY: Your Honor, the only thing I have left is the de bene esse deposition of Dr. Witorsch taken on January 13th, which has been filed with the Court. Dr. Witorsch is out of the country, and his deposition was taken under the understanding it would be a de bene esse deposition by notice. So I would move for that to be admitted into evidence at this time. . .